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PATENT
Customer No. 22,852
Attorney Docket No. 09354.0003 (Previously 07336.0003)

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:)
)
Mariko OKAMOTO et al.) Group Art Unit: 1615
)
Application No.: 09/667,420) Examiner: B. FUBARA
)
Filed: September 21, 2000)
)
For: GEL COMPOSITION AND ITS) Confirmation No.: 8873
 USE IN COSMETIC
 COMPOSITIONS AND THE LIKE)

Mail Stop Appeal Brief--Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

TRANSMITTAL OF APPEAL BRIEF (37 C.F.R. 41.37)

Transmitted herewith is the APPEAL BRIEF in this application with respect to the
Notice of Appeal filed on June 23, 2005.

This application is on behalf of

Small Entity Large Entity

Pursuant to 37 C.F.R. 41.20(b)(2), the fee for filing the Appeal Brief is:

\$250.00 (Small Entity) \$500.00 (Large Entity)

TOTAL FEE DUE:

Notice of Appeal Fee \$ 500.00

Extension Fee (if any) \$ 120.00

Total Fee Due \$ 620.00

Enclosed is a check for \$620.00 to cover the above fees.



PETITION FOR EXTENSION. If any extension of time is necessary for the filing of this Appeal Brief, and such extension has not otherwise been requested, such an extension is hereby requested, and the Commissioner is authorized to charge necessary fees for such an extension to our Deposit Account No. 06-0916. A duplicate copy of this paper is enclosed for use in charging the deposit account.

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: September 23, 2005

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PATENT
Customer No. 22,852
Attorney Docket No. 09354.0003-00 (Previously 07336.0003-00)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:)
Mariko OKAMOTO et al.) Group Art Unit: 1615
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Mail Stop Appeal Brief--Patents

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P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

Further to the Notice of Appeal filed June 23, 2005, and pursuant to 37 C.F.R. § 41.37, Appellants present this brief and enclose herewith a check for the fee of \$500.00 required under 37 C.F.R. § 41.20(b)(2). The period for filing the appeal brief has been extended one month to September 23, 2005, by the accompanying petition and fee.

This appeal is in response to the final Office Action dated March 24, 2005 ("Final Office Action"), rejecting claims 1-4, 6-10, and 18-41, which are set forth in section VIII, Claims Appendix, of this paper.

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I. Real Party In Interest

L'Oréal S.A. is the assignee of record.

II. Related Appeals and Interferences

Appellants, Appellants' undersigned legal representative, and L'Oréal S.A. know of no other appeals or interferences which will directly affect, be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status Of Claims

Claims 1-4, 6-10, and 18-41 are pending in this application, and have been finally rejected. Final Office Action, page 1. Specifically, claims 1-4, 6-10, and 18-41 have been finally rejected under 35 U.S.C. § 103(a) as being unpatentable over Japanese Application No. JP 11-021227 (*"the JP reference"*) and U.S. Patent No. 5,976,510 to Cernasov et al. (*"Cernasov"*). Final Office Action, pages 2-5.

IV. Status Of Amendments

No claims have been amended in response to or subsequent to the Final Office Action.

V. Summary Of Claimed Subject Matter

The claims of the present invention recite gel compositions comprising (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and (2) at least one ingredient chosen from pigments and fillers, wherein the at least one ingredient is surface-treated by at least one fluorine compound. Specification, page 3, lines 3-6; page 4, lines 18-21. The claims of the present invention also recite cosmetic compositions and external agents for skin using the inventive gel composition, as well as processes for stabilizing a gel composition. *Id.* page 3, lines 7-13. The inventive gel composition "has at least one of the following characteristics: (1) excels in pigment and/or filler dispersability and stability; (2) has a good outer appearance in comparison to conventional gel compositions; and (3) can possess both (1) and (2) even when comprising a relatively large amount of pigments." *Id.* page 2, lines 15-19.

One embodiment of the present invention, as recited in independent claim 1, is directed to a gel composition comprising:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

Id. page 3, lines 3-6; page 4, lines 18-21.

Embodiments of the present invention, as recited in independent claim 35, 37, 38, and 40, are directed to a cosmetic composition; an external agent for skin; a

makeup, a suncare, a skin care or a hair care composition; and a foundation, a lip product, a blush, an eye-shadow, an eyeliner, a concealer, a mascara, or a nail enamel, respectively, comprising a gel composition comprising:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

Id. page 3, lines 3-8; page 4, lines 18-21; page 9, lines 6-13.

A further embodiment of the present invention, as recited in independent claim 41, is directed to a process for stabilizing a gel composition, comprising including in the gel composition an effective amount of:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

Id. page 3, lines 9-13; page 4, lines 18-21.

VI. Grounds of Rejection To Be Reviewed on Appeal

Review of one ground of rejection is sought in this appeal. In the Final Office Action, pages 2-5, the Examiner has maintained the rejection of claims 1-4, 6-10, and 18-41 under 35 U.S.C. § 103(a) as unpatentable over Japanese Application No. JP 11-021227 ("the *JP reference*") and U.S. Patent No. 5,976,510 to Cernasov et al. ("Cernasov").

VII. Argument

Each claim of the present application is separately patentable, and upon issuance of a patent will be entitled to a separate presumption of validity under 35 U.S.C. § 282. The arguments set forth below are arranged under subheadings, and in accordance with 37 C.F.R. § 41.37(c)(1)(vii), these subheadings indicate the claims whose patentability is argued separately.

In order to satisfy the initial burden of establishing a *prima facie* case of obviousness, the Examiner must first show that the prior art references teach or suggest all the claim limitations. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). The Examiner must also show that there is some suggestion or motivation, either in the references or in the knowledge generally available to one of ordinary skill in the art, to modify or combine the references. *In re Rouffet*, 149 F.3d 1350, 47 USPQ2d 1453 (Fed. Cir. 1998). Further, the Examiner must show that there is a reasonable expectation of success from such modification or combination. *In re Dow Chem. Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1531 (Fed. Cir. 1988). In addition, “[b]oth the suggestion and the reasonable expectation of success must be found in the prior art reference[s], not in the Applicant’s disclosure.” *In re Vaeck*, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991).

A. **Claims 1-4, 6-10, and 18-40 Are Patentable Over the JP Reference and Cernasov**

In the present case, as has been demonstrated in the record, a *prima facie* case of obviousness has not been established for claims 1-4, 6-10, and 18-40, because the

Examiner has failed to point to any evidence of any suggestion or motivation to modify or combine the references nor any evidence of a reasonable expectation of success from any such modification or combination.

The Examiner alleges that *the JP reference* discloses a gel composition, comprising, among other ingredients, polyacrylamide, and teaches that "pigments and fillers may be used in the gel composition and embodiments 4 and 5 contain pigments and talc and mica." Office Action dated June 21, 2004 ("June 21 Office Action"), page 2. However, the Examiner admits that *the JP reference* does not contain pigments and fillers which are "surface treated with at least one fluorine compound" as recited in, for example, claim 1 of the present invention. *Id.* at page 3. To remedy this deficiency, the Examiner alleges that the "composition of Cernasov contains inorganic pigments that are treated with perfluoroalkyl phosphates" (citing column 1, lines 32-67 and examples 1-3). *Id.* The Examiner concludes that as the "teachings of both references are directed to cosmetic composition, it would have been obvious to one of ordinary skill in the art to include the perfluoroalkyl phosphate treated pigments of Cernasov in the composition disclosed in *the JP reference* "with the expectation that the resulting formulation would have excellent moisture retention characteristics." *Id.* Appellants have respectfully disagreed with this assertion in the record and presented responsive arguments.

In view of Appellants' arguments set forth in the Reply under 37 C.F.R. § 1.111 filed October 26, 2004, the Examiner has apparently changed her arguments in the Final Office Action by alleging that it would have been obvious to combine *the JP*

reference and Cernasov to arrive at the presently claimed invention. Final Office Action, pages 3-4.

Appellants respectfully disagree with the Examiner in response to both of the assertions of record for at least the following reasons.

**1. Lack of the Requisite Evidence of
A Suggestion or Motivation to Modify**

First, the Examiner has failed to point to any evidence of a suggestion or motivation to modify the composition disclosed in *the JP reference* by including the perfluoroalkyl phosphate treated pigments of Cernasov in order to arrive at the presently claimed invention. Specifically, the Examiner has failed to point to any evidence of a suggestion or motivation to pick and choose the perfluoroalkyl phosphate treated pigments from the composition disclosed in Cernasov and use them in the composition disclosed in *the JP reference*.

The teaching of the perfluoroalkyl phosphate treated pigments in Cernasov is limited to a particular oil-in-water emulsion with specific dispersants. For example, Cernasov teaches that “[t]he dispersion of these physical sunscreening and pigment colorant elements is in the oily phase of the [O/W] emulsion, which comprises waxes and triglycerides . . . This dispersion is implemented essentially by using a selection from among the large number of available dispersants” (col. 2, lines 19-24) and “the combination of this specific oily phase with the specific pigments led to a stable formulation” (col. 2, lines 7-9). (Emphasis added). Nowhere does Cernasov teach use of a polymeric gelling agent in the emulsion, nor does it suggest use of the perfluoroalkyl phosphate treated pigments together with a polymeric gelling agent, let

alone the specific polyacrylamide-based polymer gelling agent as recited in, for example, the present claim 1.

The sole reason the Examiner asserts in support of the allegation of any suggestion or motivation to modify the teachings of *the JP reference* is because of "the expectation that the resulting formulation would have excellent moisture retention characteristics." June 21 Office Action, page 3. However, Cernasov clearly teaches that "[t]he special inventive combination of pigments treated with perfluoroalkyl phosphates of (a) and the dispersants of (b) in combination with the selected oily phase surprisingly results in a significantly higher moisture content for the skin than [what] was thought to be possible." Cernasov, col. 2, line 63 - col. 3, line 1. In other words, Cernasov teaches that it is not the perfluoroalkyl phosphate treated pigment itself, but the combination of the perfluoroalkyl phosphate treated pigment with the dispersants and the selected oily phase, that leads to high moisture content for the skin.

Further, *the JP reference* teaches that its composition by itself has moisturizing capability without stickiness. *The JP reference*, English translation, page 1. Therefore, contrary to the Examiner's allegation, one of ordinary skill in the art would not be motivated to include the perfluoroalkyl phosphate treated pigments of Cernasov in the composition disclosed in *the JP reference* "with the expectation that the resulting formulation would have excellent moisture retention characteristics."

**2. Lack of the Requisite Evidence of
A Suggestion or Motivation to Combine**

Second, the Examiner has failed to point to any evidence of a suggestion or motivation to combine the teachings of *the JP reference* and *Cernasov* in order to arrive at the presently claimed invention.

The sole evidence the Examiner relies on in support of the obvious-to-combine assertion is that the compositions in *the JP reference* and *Cernasov* are both cosmetic compositions. Final Office Action, pages 3-4. However, reliance on such a broad, general teaching is unacceptable, because it contradicts the requirement for specificity according to existing case law.

The Federal Circuit has clearly stated that the evidence of motivation or suggestion to combine must be "clear and particular." *In re Dembicziak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). The Examiner can satisfy the burden of establishing a *prima facie* case of obviousness "only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references." *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) (citations omitted) (emphasis added). The Federal Circuit has reaffirmed the Examiner's high burden to establish a *prima facie* case of obviousness and has emphasized the requirement of specificity, i.e., "[t]he factual inquiry whether to modify or combine references must be thorough and searching. It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with." *In re Sang-Su Lee*, 277 F.3d 1338, 61 U.S.P.Q.2d 1430, 1433 (Fed.

Cir. 2002) (emphasis added). Therefore, this rejection is improper as it is unsubstantiated.

Despite the clear lack of requisite evidence of a suggestion or motivation to combine the references, the Examiner attempts to prop up the rejection by arguing that “it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for same purpose, in order to form a third composition [that is] to be used for the very same purpose,” citing *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980). Final Office Action, pages 3-4.

As an initial matter, it is impermissible for the Examiner to rely on the *Kerkhoven* case as a short-cut attempt to establish a *prima facie* case of obviousness without first establishing the elements of a *prima facie* case as required by the Supreme Court’s decision in *Graham v. John Deere*, 383 U.S. 1, 148 U.S.P.Q. 459 (1966).

Further, neither the facts nor the holding of *Kerkhoven* applies to the present case. In *Kerkhoven*, the applicant claimed a process for preparing a detergent composition comprising mixing two known detergent materials[.]” The court held that the claims at issue requiring “no more than the mixing together” of two conventional detergents to make a third detergent composition set forth “*prima facie* obvious subject matter.” *Kerkhoven*, 205 USPQ at 1072 (emphasis added).

Here, to make the alleged combination from the cited references, the Examiner would have to pick and choose one particular compound from the composition disclosed in *the JP reference* (i.e., the polyacrylamide gelling agent) and one particular compound

from the composition disclosed in *Cernasov* (i.e., the perfluoroalkyl phosphate treated pigments) and combine them to arrive at the presently claimed invention.

In addition, the combination of one cosmetic composition with another cosmetic composition is not merely physical mixing, because of potential interaction and/or reaction of the chemical components in the cosmetic compositions, which can disrupt the stability and formation of gelling compositions. As *Cernasov* recognizes, “[a] well-balanced composition is essential to achieving a stable emulsion.” See *Cernasov*, col. 1, lines 10-11. Further, as the results shown in the Declaration under 37 C.F.R. § 1.132 filed March 5, 2004 (“the Rule 132 Declaration”) and the color photos submitted therewith, as well as the results shown on page 11, Table I, of the originally-filed specification indicate, satisfactory characteristics, such as stable gel formation and good lasting effects and sense of application on the skin, of a composition cannot be obtained from all possible combinations of one cosmetic composition comprising a gelling agent and another cosmetic composition comprising either treated or untreated pigments. Therefore, *Kerkhoven* does not apply to this case.

Moreover, “the mere fact that references can be combined or modified does not render the resultant combination obviousness unless the prior art also suggests the desirability of the combination.” *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990) (emphasis in original and emphasis added). *Cernasov* teaches that “the combination of this specific oily phase with the specific pigments led to a stable formulation.” *Cernasov*, col. 2, lines 7-9 (emphasis added). As the composition disclosed in *Cernasov* is already a stable emulsion, without the disclosure of the present

invention, one of ordinary skill in the art would not have the desire nor have been motivated to combine it with the composition disclosed in *the JP reference*.

Instead, combining Cernasov's composition, which is already a stable emulsion, with the composition disclosed in *the JP reference* could disrupt the stability of Cernasov's composition without forming another stable composition, given the fact that Cernasov teaches that a "well-balanced composition is essential to achieving a stable emulsion." See Cernasov, col. 1, lines 10-11. Therefore, the Examiner has apparently adopted a hindsight approach, which is improper.

3. Lack of A Reasonable Expectation of Success

The Examiner has also failed to point to any evidence of a reasonable expectation of success.

Indeed, Cernasov clearly teaches that a "well-balanced composition is essential to achieving a stable emulsion . . . because individual components with frequently conflicting characteristics must be integrated into such an emulsion." Cernasov, col. 1, lines 10-14. Cernasov also teaches that the pigments treated with a perfluoroalkyl phosphate "acquire water and oil-repellent characteristics" and "the subsequent processing in certain cosmetic products is not generally possible due to the water and oil-repellent characteristics." *Id.* col. 1, line 58- col. 2, line 3. Therefore, Cernasov recognizes that one cannot simply pick and choose one ingredient in one composition and combine it or the composition itself with another composition without potentially changing the nature and stability of the final products.

Further, as shown in the results on pages 4-5 of the Rule 132 Declaration and the color photos enclosed therewith, and the results shown on page 11, Table 1, of the originally-filed specification, when the fluorine compound treated pigment is used with agents other than the gelling agent recited in, for example, the present claim 1 (i.e., compositions 2, 3, and 8 in the Rule 132 Declaration, and compositions 2 and 3 in the originally filed specification), the resulting compositions do not have satisfactory characteristics, such as stable gel formation and good lasting effects and sense of application on the skin, in comparison with composition 1, which is in accordance with the presently claimed invention. Therefore, this rejection is improper.

4. The Rule 132 Declaration Provides Valid Evidence of Non-obviousness

Nevertheless, the Examiner alleges that “Applicants’ 132 declaration does [not] give data on how the instant composition and the composition of the prior art affect skin.” June 21 Office Action, page 3.

Appellants respectfully submit that such data have already been disclosed in the originally-filed specification on pages 10 and 11, i.e., the results associated with the lasting effects and sense of application.

The Examiner further alleges that in the Rule 132 Declaration, the comparison of “the individual composition of Cernasov with the inventive composition” “is attacking the individual Cernasov reference.” Final Office Action, page 4. The Examiner also alleges that Applicants should “compare the combined composition of the JP reference and Cernasov with the inventive composition.” *Id.* at pages 4-5. Therefore, the Examiner concludes that “applicants failed to show that the composition of Cernasov cannot be

combined with the composition [disclosed in *the JP reference*].” *Id.* at page 5.

Appellants respectfully submit that the Examiner is incorrect with respect to these allegations.

First, the M.P.E.P. clearly indicates that “evidence of unexpected results must compare the claimed invention with the closest prior art, [but] applicant is not required to compare the claimed invention with subject matter that does not exist in the prior art.” See M.P.E.P. §716.02(e) III (citing *In re Geiger*, 815 F.2d 686, 689, 2 USPQ3d 1276, 1279 (Fed. Cir. 1987)). Here, *the JP reference* or *Cernasov* is presumably the closest prior art, as both of them are cited by the Examiner in support of this section 103(a) rejection. The combination of *the JP reference* and *Cernasov* does not exist in the prior art. Requiring Appellants to compare the claimed composition with the combination of *the JP reference* and *Cernasov* as alleged by the Examiner “would be requiring comparison of the results of the invention with the results of the invention” and is clearly improper as indicated in the M.P.E.P. §716.02(e) III (citing *In re Chapman*, 357 F.2d 418, 148 USPQ 711 (CCPA 1966)).

Finally, the Examiner is incorrect in alleging that “applicants failed to show that the composition of *Cernasov* cannot be combined with the composition [disclosed in *the JP reference*]” in support of this section 103(a) rejection. See Final Office Action, page 5. The “mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination.” *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990) (emphasis in original and emphasis added). As discussed above, the Examiner has failed to point to

any evidence of such a suggestion or desirability to combine *the JP reference* and *Cernasov*.

Accordingly, as the Examiner has failed to establish a *prima facie* case of obviousness for claims 1-4, 6-10, and 18-40, this rejection is improper and should be reversed and withdrawn.

B. Claim 41 Is Patentable over *the JP Reference and Cernasov*

The Examiner has also failed to establish a *prima facie* case of obviousness for claim 41 for at least the following reasons.

First, the Examiner has failed to show that the combination of *the JP reference* and *Cernasov* teach or suggest all limitations of the present claim 41. Specifically, *the JP reference and Cernasov*, either alone or in combination, do not teach or suggest “a process for stabilizing a gel composition” as recited in the present claim 41.

Further, as discussed in subsection A, the Examiner has failed to point to any evidence of a suggestion or motivation to modify or combine the references nor any evidence of a reasonable expectation of success from any such modification or combination.

Accordingly, as the Examiner has failed to establish a *prima facie* case of obviousness for claim 41, this rejection is improper and should also be reversed and withdrawn.

Conclusion

In view of the foregoing, Appellants respectfully submit that a *prima facie* case of obviousness has not been established, and request that the outstanding §103(a) rejection be reversed and withdrawn.

VIII. Claims Appendix

1. (previously presented) A gel composition comprising:

(1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and

(2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

2. (original) A composition according to claim 1, wherein said at least one ingredient is chosen from inorganic pigments, organic pigments, pearlescent gloss pigments, macromolecular powders, and functional pigments.

3. (original) A composition according to claim 2, wherein said at least one ingredient is chosen from extender pigments, coloring pigments, and whitening pigments.

4. (original) A composition according to claim 1, wherein said at least one ingredient is chosen from talc, mica, kaolin, calcium carbonate, magnesium carbonate, silicic anhydride, aluminum silicate, magnesium silicate, calcium silicate, aluminum oxide, barium sulfate, red iron oxide, yellow iron oxide, black iron oxide, chrome oxide, ultramarine blue, prussian blue, carbon black, titanium oxide, zinc oxide, mica titanium, fish scale flakes, bismuth oxychloride, boron nitride, nylon powder, silk powder, tar pigments and natural pigments.

5. (canceled).

6. (previously presented) A composition according to claim 1, wherein the fluorine compounds are chosen from compounds having perfluoroalkyl groups.

7. (previously presented) A composition according to claim 6, wherein the fluorine compounds are chosen from perfluoroalkyl phosphates, perfluoroalkyl silanes, perfluoroalkyl silazanes, polyhexafluoropropylene oxides, perfluoroalkyl-group-containing organosiloxanes, per-fluoropolyethers, perfluoro alcohols, perfluoroalkylacrylate polymers, and derivatives thereof.

8. (original) A composition according to claim 7, wherein the fluorine compounds are chosen from perfluoroalkyl phosphates and perfluoroalkyl silanes.

9. (original) A composition according to claim 8, wherein the perfluoroalkyl phosphates are chosen from perfluoroalkyl phosphate diethanolamine salts.

10. (original) A composition according to claim 8, wherein the perfluoroalkyl silanes are chosen from silane coupling agents.

11. - 17. (canceled)

18. (original) A composition according to claim 1, wherein the at least one ingredient is present in an amount ranging from 0.1%-20% by weight, relative to the total weight of the composition.

19. (original) A composition according to claim 18, wherein the at least one ingredient is present in an amount ranging from 0.5%-10% by weight, relative to the total weight of the composition.

20. (original) A composition according to claim 1, further comprising, in a maximum amount of 5% by weight relative to the total weight of the composition, at least one second ingredient chosen from pigments and fillers, said pigments and fillers not having been surface-treated.

21. (original) A composition according to claim 1, wherein the at least one polyacrylamide-based polymer is chosen from polyacrylamides.

22. (original) A composition according to claim 21, wherein the at least one polyacrylamide-based polymer is chosen from acrylamide/acrylamide-2-methylpropane sulfonate copolymers.

23. (original) A composition according to claim 1, wherein the at least one polyacrylamide-based polymer is present in an amount ranging from 1.0%-80.0% by weight relative to the total weight of the at least one gelling agent.

24. (original) A composition according to claim 1, wherein the at least one gelling agent further comprises at least one compound chosen from hydrocarbons and non-ionic surfactants.

25. (original) A composition according to claim 24, further wherein said composition contains no other surfactant.

26. (original) A composition according to claim 24, wherein the hydrocarbons are chosen from isoparaffins, petrolatum, ceresin and squalane.

27. (original) A composition according to claim 26, wherein the isoparaffins are chosen from C₄ - C₂₀ isoparaffins.

28. (original) A composition according to claim 24, wherein the hydrocarbons are present in an amount ranging from 1.0%-60.0% by weight relative to the total weight of the at least one gelling agent.

29. (original) A composition according to claim 24, wherein the non-ionic surfactants are chosen from polyoxyethylene alkyl (C₁₂-C₁₄) ethers and polyoxyethylene sorbitan fatty acid esters.

30. (original) A composition according to claim 24, wherein the non-ionic surfactant is present in an amount ranging from 0.1%-20.0% by weight relative to the total weight of the at least one gelling agent.

31. (original) A composition according to claim 1, wherein the at least one gelling agent is present in an amount ranging from 0.1%-10% by weight relative to the total weight of the composition.

32. (original) A composition according to claim 31, wherein the at least one gelling agent is present in an amount ranging from 0.1%-5% by weight relative to the total weight of the composition.

33. (original) A composition according to claim 1, wherein the gel composition is an aqueous gel chosen from aqueous gels comprising no oils and aqueous gels comprising oils present in a maximum amount of 10% by weight relative to the total weight of the composition.

34. (original) A composition according to claim 1, wherein the gel composition is an aqueous gel comprising aqueous constituents in an amount exceeding at least 50% by weight relative to the total weight of the composition.

35. (previously presented) A cosmetic composition comprising a gel composition comprising:

(1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and

(2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

36. (original) A cosmetic composition according to claim 35 further comprising at least one additive chosen from organic solvents, softening agents, anti-oxidants, anti-free radical agents, opacifiers, stabilizers, emollients, defoaming agents, humectants, vitamins, fragrances, preservatives, sequestering agents, polymers other than said at least one polyacrylamide-based polymer, basic and acidic agents, dyes, self-tanning agents, and other conventional cosmetic and dermatological adjuvants.

37. (previously presented) An external agent for the skin comprising a gel composition comprising:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

38. (previously presented) A makeup, a sun care, a skin care or a hair care composition comprising a gel composition comprising:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound, wherein the at least one ingredient is chosen from pigments and fillers.

39. (original) A composition according to claim 38, wherein the makeup is for the face, lips, eyes, nails or hair.

40. (previously presented) A foundation, a lip product, a blush, an eye-shadow, an eyeliner, a concealer, a mascara, or a nail enamel comprising a gel composition comprising:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and

(2) at least one ingredient surface treated with at least one fluorine compound,
wherein the at least one ingredient is chosen from pigments and fillers.

41. (previously presented) A process for stabilizing a gel composition comprising including in said gel composition an effective amount of:

- (1) at least one gelling agent comprising at least one polyacrylamide-based polymer, and
- (2) at least one ingredient surface treated with at least one fluorine compound,
wherein the at least one ingredient is chosen from pigments and fillers.

IX. Evidence Appendix

The Declaration under 37 C.F.R. § 1.132 and the attached color photos were filed on March 5, 2004, and were entered into the record¹. See Office Action dated June 21, 2004, page 2. The color photos were again submitted to the Examiner during the interview of the Examiner by Appellants' representative dated October 6, 2004. See Interview Summary.

¹ In the Office Action dated June 21, 2004, page 2, the Examiner stated that "Rule 131 affidavit" was filed on March 5, 2004. During the interview with Appellants' representative held on October 6, 2004, the Examiner confirmed that a Rule 132 Declaration, instead of a "Rule 131" Declaration was filed on March 5, 2004. See Reply under 37 C.F.R. § 1.111 filed October 26, 2004, page 2.

X. Related Proceedings Appendix

None.

Application No.: 09/667,420
Attorney Docket No. 09354.0003-00 (Previously 07336.0003-00)

Please grant any extensions of time required to enter this Brief and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
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Michele C. Bosch Reg. No.
40,524

Dated: September 23, 2005

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